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No. 542

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

IN THE MATTER OF CITY OF COLUMBUS

vs.

HENRY R. HAYES

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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LAW AND ARGUMENT

1. WAS THE ADMISSION OF THE RESULTS OF A URINALYSIS TEST A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS?

In his argument, Petitioner has combined the issues concerning the urinalysis test with the issues pertaining to conversations between the arresting officer and defendant. Respondent will discuss these two issues separately.

Petitioner contends that the admission of the urinalysis test was a violation of defendant's constitutional rights. In the fifth paragraph of page seven of his petition, Petitioner states:

> "In the instant case here it is apparent that the defendant did not wish to consider giving a test until after he consulted with his attorney."

In the second paragraph of page eight, Petitioner states:

> "It would appear from an entire reading of the record that upon the examination the defendant would not

have taken a test if not prompted to by the arresting officer."

It is respectfully submitted by Respondent that the cases and arguments submitted in Petitioner's brief present no legal authority to justify the exclusion of the urinalysis test in the case at bar.

The attention of the Court is respectfully directed to the recent United States Supreme Court case of *Schmerber vs. State of California,* 34 L.W. 4586. In this case defendant was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor.

At the direction of the police officer, a blood sample was withdrawn from the defendant's body despite his refusal, on the advice of his counsel, to consent to the test. The defendant contended in that case that the withdrawal of the blood and the admission of the analysis denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to Counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The California Court rejected these contentions and affirmed the conviction. The United States Supreme Court affirmed the decision of the California Court.

On page 4587 the United States Supreme Court used the following language in dismissing the claim that the withdrawal of blood violated petitioner's privilege against self-incrimination:

"We there held that the Fourteenth Amendment secures against state invasion the same privilege the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he

> chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence. We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

In distinguishing the *Miranda* case, which petitioner cites on page 4 of his brief, the Court states the following on page 4587:

> "As the passage in Miranda implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authority in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through 'the cruel, simple expedient of compelling it from his own mouth . . . ' "

On page 4588 the Court states:

> " . . . both federal and state courts have usually held that it (the privilege) offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.' "

The logic of the case just quoted and its applicability to the case at bar becomes apparent when one considers the purpose of our constitutional guarantee against self-incrimination. The spirit or purpose of the privilege is to

prevent police officials from forcing evidence of the guilt of the accused from his own mouth. However, as the *Schmerber* case points out, certain evidence is not covered by the privilege since by the very nature of said evidence, the purpose of the privilege could not be served. Although the statements of an accused could vary under improper interrogating method, certain physiological traits will not. The fingerprints of an accused will not change, whether he voluntarily submits his hand or the police hold his hand to take the prints. His photograph will be the same, whether he is frightened or confident. So also, will the chemical analysis of his blood or urine yield a certain result, whether he volunteers the sample or is told he must submit such a sample. Since this "real or physical" evidence will not vary even if it is not voluntarily made, the Court in the *Schmerber* case has arrived at the only logical conclusion which is that the privilege against self-incrimination does not apply to such "real or physical" evidence.

Since the privilege does not cover the results of a urinalysis test, the assertions that defendant was not permitted to telephone his attorney until after the specimen was submitted are immaterial. In the *Schmerber* case the Court resolved the right to counsel claim with the following language on page 4588:

> "The conclusion also answers petitioner's claim that in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, he was denied his sixth amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it."

Based upon the foregoing authorities and arguments respondent respectfully submits that the admission of the urinalysis test was not a violation of petitioner's constitutional rights.

2. DOES THE MIRANDA DOCTRINE APPLY TO A MISDEMEANOR CASE ARISING BEFORE THE MIRANDA DECISION IN WHICH NO EVIDENCE OF CUSTODIAL INTERROGATION WAS PRESENTED BY THE PROSECUTION?

Petitioner's argument asserts certain constitutional violations occurring during the interrogation of defendant by the arresting officer. At the conclusion of a *voir dire* examination, the trial court overruled the motion of defendant to suppress conversations which the arresting officer had with the defendant. There was certainly testimony to support this ruling since the officer testified that Petitioner stated he "was well aware of his rights" (P. 9, Record) and that Petitioner was told he need "make no statement unless he had counsel if he so desired." A careful examination of the record clearly reveals that there was no discussion of any conversations, statements, admissions, or confessions made by the defendant during the direct examination of the arresting officer. The only testimony elicited by the prosecution from the arresting officer dealt with the physical characteristics displayed by Petitioner on the night of the arrest. The only testimony concerning conversations between the arresting officer and the defendant occurred during the cross-examination of the officer by defendant's own attorney. The attention of the Court is respectfully directed to page 38 of the Record:

Q. (By defense counsel). "Now, did you ask the defendant if he had anything to drink that night? A. Yes, I did.

Q. What did he tell you? A. He told me yes.

Q. What did he tell you he was drinking? A. He told me he had one martini and one coca cola."

This cross-examination was the first and only time that the jury heard the arresting officer testify as to what statements defendant made on the night of the arrest. Since no

prejudicial admissions or statements were raised on direct examination but only on cross examination by defense counsel, it would seem apparent that the fact pattern presented in this case simply does not support petitioner's contention that his rights were violated under the Miranda doctrine.

Respondent respectfully directs the attention of the Court to *Johnson v. New Jersey,* 86 S.Ct. 1772. In this case, the United States Supreme Court determined that the constitutional principles announced in the *Escobedo* and *Miranda* cases do not apply retroactively but apply only to trials begun after June 13, 1966, the date on which the *Miranda* decision was announced. The determination that the principles of the *Miranda* decision are to be applied prospectively only was again set forth in *Davis v. North Carolina* 86 S.Ct. 1761. It is to be noted that the trial of petitioner began on April 14, 1966, almost exactly three months before the announcement of the *Miranda* decision. It is, therefore, respectfully urged that the *Miranda* decision, so strenuously argued by Petitioner, is not applicable in the case presently before the Court.

It seems apparent that this particular case has neither the proper fact pattern nor the proper time sequence for the Court to determine the applicability of the *Miranda* doctrine to a misdemeanor of this type.

Based upon the foregoing arguments and the authorities, Respondent respectfully contends that Petitioner's writ of certiorari should be denied and this case should not be certified and reviewed by the Court.

Respectfully submitted,

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